IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 298

LEO ZITTMAN (with whom The Chase National Bank of the City of New York was impleaded below),
Petitioner,

v.

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

No. 299

LEO ZITTMAN (with whom the Federal Reserve Bank of New York was impleaded below),
Petitioner,

v.

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

REPLY BRIEF FOR PETITIONER ZITTMAN

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CASES AND AUTHORITIES CITED

ARGUMENT

I

Respondent's position below—reiterated here—is that an unlicensed transaction in frozen funds cannot furnish "the basis for the assertion or recognition of *any* interest or right in any blocked property" (Resp. Br. below, p. 23). The *Singer* and *Mellie Iran* cases, by holding precisely to the contrary, have made this position untenable. Both *Singer* and *Mellie Iran* asserted such rights. And this Court has recognized them. Today, *Singer* and *Banque Mellie Iran*—by the mandate of this Court—hold valid rights *in rem* against frozen Japanese funds vested by the Custodian—rights which rest solely upon a prohibited and unlicensed transaction in frozen funds. By reiterating his stand here—a stand rejected by this Court in *Singer* and *Mellie Iran*—respondent, in reality, asks this Court to reverse its holdings in those cases.

Respondent's brief overlooks, we believe, the decisive question in this case. The question is simply this: Since, in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, the Custodian must take the vested Japanese assets subject to the *unlicensed* claims of Singer and Mellie Iran, payable when licensed, must not petitioner, Zittman's, *authorized* attachment be accorded, at least, the same standing?

Everything said here by respondent against Zittman's claim—and more—can be said against the claims of Singer and Mellie Iran. Thus, the latter "sought to realize on the local assets of enemy nationals". Both asserted that "New York's judicial process had given them an interest [*in rem* under *Ticonic National Bank* v. *Sprague*, 303 U. S. 406] in the property itself" as against the Custodian's licensee, the New York Superintendent of Banks. Both claims rested upon process "issued after the freeze date and without a federal license" (Resp. Br., pp. 12-13). Both

claimants asserted causes of action which arose *after* the inception of freezing controls and out of unlicensed transactions in frozen funds—whereas Zittman's cause of action arose in 1937 (IR 198), before the controls were inaugurated.[1] Nonetheless, this Court sustained the Singer and Mellie Iran claims.

Moreover, certiorari was asked in *Singer* and *Mellie Iran* because of an alleged conflict with *Propper* v. *Clark*, 337 U. S. 472. Every argument made here by respondent was pressed in *Singer* and *Mellie Iran*—both by respondent as *amicus curiae*, and by Lyon, as respondent's licensee. Every one of these arguments was rejected by this Court in the *Singer* and *Mellie Iran* cases, when it sanctioned the view of the New York Court of Appeals that an *in rem* claim against frozen funds could be established by litigation so long as payment of the judgment were screened by license—a view first espoused in the *Polish Relief* case and consistently followed by the New York courts since.

Respondent, reiterating his argument in *Singer* and *Mellie Iran*, says that the objectives of freezing are impaired if petitioner's attachment, though authorized, is permitted to reach the frozen funds of the German banks.[2] The freezing controls, he asserts, were intended to preserve blocked property (a) for possible future vesting if needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damage done by the Gov-

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[1] Since the transaction which underlay Zittman's attachment took place in 1937 (IR 198) it was not subject to the freezing controls which, as to Germany, became effective June 14, 1941 (Exec. Ord. 8785, 6 F. R. 2897). This is in sharp contrast to the Singer and Mellie Iran claims which both *arose and were sued on* after the freeze date.

[2] Respondent's argument (Br. pp. 15-16) that the objectives of the controls made it necessary to proscribe attachments to avoid collusive transfers as the result of default judgments, deliberately acquiesced in, is a *non-sequitur*. The judgment—whether contested or on default—could not be satisfied until the payment were screened by license.

ernments of the nationals affected;[3] and (b) so that it might be distributed ratably among all United States citizens having claims against blocked nationals (Resp. Br., p. 16, 18-19). If these be the true objectives of the freezing controls, respondent has flouted them over and over again. If property was frozen for the purposes suggested, why have the Secretary of the Treasury and respondent repeatedly licensed the payment of frozen funds—of alien friend and enemy alike—to satisfy the claims of private American citizens (IR 266-269), thus preferring the claims of some over others? Why did respondent license payment of the claim of Banque Mellie Iran, even while it was pending on appeal to this Court? Respondent's actions—as distinguished from his words—demonstrate that, in practice, he has treated the controls as a screening process, purely and simply—and not as a means of achieving the ends for which he argues here.

Neither General Ruling No. 12, nor Press Release No. 34, nor Public Circular No. 31, nor the alleged authority of *Propper* v. *Clark*, nor the objectives of the freezing controls, as conceived by respondent, were permitted to defeat the claims of Singer and Banque Mellie Iran in this Court. There is no valid reason why petitioner, Zittman's, claim must be treated differently from those of Singer and Banque Mellie Iran. None has been suggested by respondent.

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[3] The Joint Resolution creating the controls cannot be said to have been an aid to vesting for these stated purposes. It was passed in peacetime when (a) there was no vesting power, (b) we were not at war and (c) there were no "enemy nationals". Moreover, even in war time we have never sanctioned, under our Constitution, the confiscation of property of alien friends—though they may technically be regarded as within the definition of "enemy nationals"—irrespective of the treatment accorded elsewhere to property of our citizens. *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 491-2; *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480; *Foreign Funds Control Through Presidential Freezing Orders*, 41 Col. L. Rev. 1039, 1044.

II

Respondent concedes that—because the *Chase* case, No. 298, involves only a "right, title and interest" vesting order—there is no issue here as to the "Custodian's paramount power to vest" (Resp. Br., p. 21). This concession at once distinguishes the instant case from *Propper* v. *Clark*, 337 U. S. 472. The latter—so this Court has said in *Lyon* v. *Singer*, 339 U. S. 841, 842—turned upon the fact that Propper "claimed title to frozen assets" against the "Custodian's paramount power to vest".[4]

To check the force of this concession, respondent questions this Court's appraisal of the *Propper* case. Contrary to this Court's view, respondent asserts that the *Propper* case, too, involved only a "right, title and interest" vesting order and not the paramount power of the Custodian to vest (Resp. Br., p. 21). If it be true—as respondent intimates—that this Court misunderstood the *Propper* case, this is but a further reason, we submit, why the *Propper* case should not be followed here.

Respondent acknowledges that the *Propper* case dealt with an unlicensed transfer of title in contrast to the instant case, which deals only with a lien premised upon an authorized attachment (Resp. Br., p. 14). He says the distinction is "without substance"; that the *Propper* case is all-inclusive and interdicts both. We are of a different opinion.

In our view, in limiting the *Propper* holding to transfers of title, this Court made a deliberate choice. It was fully aware of the fact that the freezing controls "did not pro-

[4] Respondent asserts that petitioners have no right "to resist the claim of the Custodian to take property that was admittedly enemy-owned on June 14, 1941" (Br. p. 17). The asserion overlooks two important points. *First*, the property was not enemy-owned on June 14, 1941—we were not then at war. *Second*, the Custodian is bound, under the Fifth Amendment, to respect the rights of others in the vested property. *Miller* v. *Kaliwerke*, 283 Fed. 746, 757-758; *Commercial T. Co.* v. *Miller*, 281 Fed. 804, 806, aff'd 262 U. S. 51; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79.

hibit all transactions without license" involving frozen property. 337 U. S. 472, 480. This Court concluded that the Joint Resolution effected "a valid plan for control of the property covered by the regulation that prohibited any change of *title* to that property". And this Court expressly premised its "determination on the purpose of Congress to prevent shifts in *title* to blocked assets". 337 U. S. 472, 486. It must be assumed that these explicit and repeated references in *Propper* to transfer of title—used by this Court in expressing its "conclusion" and the basis of its "determination"—were a deliberate, not a casual, choice.

That this Court limited the *Propper* holding to transfers of title is emphasized by its express refusal to decide "whether every determination of rights concerning blocked property in unlicensed litigation is voidable." 337 U. S. 472, 486. By limiting its holding to transfers of title and reserving its freedom to pass upon other litigation involving frozen funds, this Court left itself free to review, independently of *Propper*, the issues which are common to the instant case and the *Singer* and *Mellie Iran* cases.

The *Propper* case is no more dispositive here than it was in *Singer* and *Mellie Iran*.

III

Respondent asserts that the Treasury's position, as expounded by him here, was accepted in the *Polish Relief* case. We believe that the Respondent has misapprehended the holding.

The Treasury, as we understand it, presented two main points to the New York Court of Appeals. *First*, it urged that the Secretary had authorized the bringing of an attachment action (Treasury Br. p. 39); *second*, that the attachment created a "contingent interest" which was "null and void unless authorized by the Secretary". (Treasury Br., p. 52)

As to the *first*, the Treasury and the New York Court of Appeals were in agreement that an attachment action was

permitted—though their conclusions rested on different premises. The Treasury view was that the right to attach existed by reason of Treasury authority. The New York Court of Appeals took the view that the "Executive Order did not forbid attachment * * *" (288 N. Y. 332, 338).[5]

As to the *second*, the New York Court of Appeals flatly rejected the Treasury position that the attachment effected only a contingent interest, saying at page 338, "* * * These actual liabilities [the attached bank accounts] were not transmuted into contingent obligations merely because the Executive Order had adventitiously put a stay upon them."[6]

There can be no doubt as to the holding in the *Polish Relief* case when this case is considered together with *Feuchtwanger* v. *Central Hanover Bank & T. Co.*, 288 N. Y. 342, decided the same day. In the *Feuchtwanger* case the New York Court of Appeals held that the courts of New York could—without Treasury license—take jurisdiction of frozen funds in an *in rem* proceeding and declare the frozen funds to be impressed with a trust in plaintiff's

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[5] Respondent errs in assuming that attachments of frozen funds fall within the ban of Sec. 1E of Exec. Order 8389 (Resp. Br. pp. 10-11). The evidence—including the Treasury's own explanation of Sec. 1E—is overwhelming that Sec. 1E was directed only against the transfer of *stocks and bonds*. U. S. Treasury Dept., *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 20-1; *U. S.* v. *Leiner*, 2nd Cir., 143 F. (2d) 298, 300; brief for U. S., *amicus curiae*, p. 16, in the *Polish Relief* case; H. Rep. No. 2009, 76th Cong., 3d Sess., 1940; S. Rep. 1946, 76th Cong., 3d Sess., 1940; Senator Wagner in 86 Cong. Rec. 5006.

[6] Upon analysis, it would appear that the Treasury's view was rejected by both the majority and the minority in the *Polish Relief* case. The majority did so because they found that the freezing controls permitted a valid—not a "conditionally null and void"—seizure by attachment of the frozen funds and so met the dictates of *Pennoyer* v. *Neff*. The minority found, in effect, that the attachment of frozen funds did not effect a seizure within the requirement of *Pennoyer* v. *Neff*. This was a repudiation of the Treasury view that a seizure, which was "conditionally null and void", would sustain a valid attachment.

favor, limiting the need for a license to the point at which title to the funds was to be transferred from an account in the name of defendant to one in plaintiff's name. When the *Polish Relief* and *Feuchtwanger*[7] cases are read together, it is clear that the New York Court of Apepals held precisely as Respondent has stipulated here, viz., that the freezing controls did not limit an attachment and that only payment of the ensuing judgment was to be screened by Treasury license.

IV

Respondent's brief in the Court of Appeals (pp. 25-26) contains the following statements:

> "* * * Appellants stress throughout their briefs that a license was not required to institute a suit by attachment. Appellee concedes this and has so stipulated (266). What appellants persistently ignore, however, is that the attachment could not actually reach the blocked property unless and until a license was obtained. * * *"

This statement frames respondent's position throughout this litigation.

To say, as respondent does, that an attachment was permitted but that it "could not actually reach the blocked property" until a post-judgment license issued is to state a legal absurdity. If the process "actually reach[es] the blocked property" there is an attachment; otherwise there is none. An attachment is simply a process for actually reaching property at the commencement of an action, in order that it may be brought under the control of the court

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[7] The concurring opinion in the *Feuchtwanger* case notes that the parties did not argue the force of Exec. Order 8389. The holding of the majority, however, must be taken to have considered the effect of the Executive Order. Had the Order forbidden what the judgment in the case undertook to do, the N. Y. Court of Appeals would have been under a duty to have noticed the question on its own motion. *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261.

and dealt with—consistently with the 14th Amendment—by the ensuing judgment. *Pennoyer* v. *Neff*, 95 U. S. 714.

Respondent does not meet the issue by arguing that in some states, e.g. Wisconsin, the state law permits the court to reach the property by means other than attachment. We are dealing here (a) with the laws of New York which specify that the means *shall* be attachment and (b) with the Treasury's specific ruling that this means is permissible under the freezing controls.

Nor would respondent's argument fare better in a state which permits *in rem* seizures by means other than attachment. Whatever the means, it must bring the property under the control of the court—i.e. "actually reach" it before judgment—in order to satisfy the dictates of the 14th Amendment as expounded in *Pennoyer* v. *Neff*, *supra*. Respondent's view that, under the freezing controls, the property may not be brought under the court's control before judgment, would proscribe not only attachment but also every other method for securing *in rem* jurisdiction consistently with the dictates of *Pennoyer*. Not even respondent would contend for such a result under the plain stipulation of fact in this case.

Conclusion

The New York State Court of Appeals and the Second Federal Circuit are in irreconcilable conflict as to the force of the freezing controls. The view of the New York State Court has the sanction of this Court's holding in the *Singer* and *Mellie Iran* cases. The Second Circuit finds sanction for its view in this Court's earlier holding in *Propper* v. *Clark*. We believe sincerely—as do many others at the Bar—that there can be no real guide for the solution of freezing control problems until the conflict of views between these two courts of co-ordinate jurisdiction

is resolved. Surely the rights of litigants should not hang upon the fortuitous circumstance of whether their cases are processed in one court as against the other.

It is earnestly urged that certiorari be granted.

Respectfully submitted,

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